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COURT OF APPEALS

IN THE

COURT OF APPEALS OF INDIANA

CAUSE NO. 49A02-0701-CR-110

MICHAEL HILL,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Superior Court of Marion County, Criminal Division, Room 6

Cause No. 49G06-0508-FA-144651

The Honorable Jane Magnus-Stinson, Judge.

BRIEF OF APPELLEE

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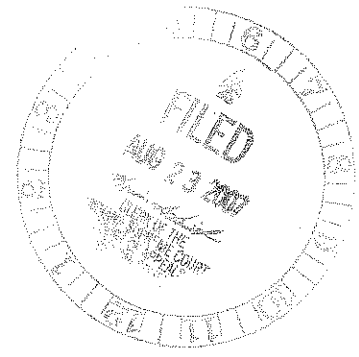

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BRIEF OF APPELLEE

STATEMENT OF THE ISSUES

I. Whether the trial court properly permitted the State to amend the charging information in form after the omnibus date.

II. Whether the evidence is sufficient to sustain Defendant's conviction for attempted sexual misconduct with a minor.

STATEMENT OF THE CASE

Nature of the Case

Michael Hill ("Defendant") appeals from his conviction for attempted sexual misconduct with a minor,[1] a Class B felony (App. 1–2, 182).

[1] Ind. Code § 35-42-4-9; I.C. 35-41-5-1.

Course of the Proceedings

On August 23, 2005, the State charged Defendant with attempted child molesting,[2] a Class A felony, and resisting law enforcement,[3] a Class A misdemeanor (App. 32–33). The court conducted an initial hearing on August 24, 2005, and set an omnibus date of October 21, 2005 (App. 184–85). On October 25, 2005, at the first pre-trial conference, the State filed a motion to add Count III, attempted sexual misconduct with a minor, a Class B felony, which the court granted over Defendant's objection (App. 52). The court conducted a jury trial on July 10, 2006, and on July 11, 2006, the jury found Defendant guilty on Counts II and III (App. 16–17, 180–83). On August 29, 2006, the court sentenced Defendant to concurrent terms of one year on Count II and ten years on Count III, correcting its original July 26, 2006, sentencing order and subsequent August 9, 2006, sentencing order (App. 18–19, 26–28). Defendant originally filed his notice of appeal on August 25, 2006, and he filed second notice of appeal on November 2, 2006 (App. 1–2).

STATEMENT OF FACTS

In July and August, 2005, Defendant telephoned four different adult personal chat lines multiple times, including Tango Personal (Tr. 140, 172–73). During the same time period, thirteen year old P.C. telephoned one of the chat lines and talked to a person who identified himself as "James" (Tr. 44, 49). P.C. lived with her mother Brenda, two brothers, and her step-father Brian Payne (Tr. 45, 81, 100). There were two phone lines in the household, one for Brenda and Brian, and another for the children (Tr. 81). P.C. established a profile on the chat line, indicating she was seventeen (Tr. 48). After talking to "James," he gave P.C. his number (Tr. 50). "James" obtained P.C.'s number from his caller ID (Tr. 50). P.C. and "James" talked

[2] I.C. 35-42-4-3; I.C. 35-41-5-1.
[3] I.C. 35-44-3-3.

at least eighteen times between August 8 and August 11, 2005 (Tr. 160, 163). Brenda spoke with "James" four to five times and told him P.C. was thirteen at the time[4] (Tr. 91).

ISSUE #2

"James" telephoned P.C. at 11:18 p.m. on August 11, 2005, (Tr. 150). The call lasted for eight minutes while P.C. directed "James" to her house (Tr. 68–69, 150). P.C. opened the door for "James," who did not knock or ring the doorbell (Tr. 53). P.C. and "James" went straight to her bedroom and P.C. locked the door after they entered her room (Tr. 69). "James" and P.C. were in P.C.'s bedroom seven to ten minutes (Tr. 153). P.C. had a single bed, a multi-colored dresser, and a table for the television and stereo (State's Exh. 1, 2). At first, "James" and P.C. were talking and watching television (Tr. 54). "James" then pulled off P.C.'s pants (Tr. 56). Shortly thereafter, "James" and P.C. were hugging and kissing, "things got heated," and "James" put on a condom (Tr. 153).

At that time, Brenda asked Brian to check on the children to make sure they were going to bed (Tr. 82–83). Brian, who is 6'6" tall and weighs 300 pounds, knocked on P.C.'s door and heard the blinds moving inside (Tr. 84, 102, State's Exh. 1). P.C. opened the door and said she was asleep, but Brian did not believe her and checked the bedroom closet (Tr. 103). Brian then looked under the bed and saw Defendant, wearing nothing but socks and a condom (Tr. 103–104). Defendant tried to pull his pants up and started running (Tr. 104). Brian grabbed Defendant by the neck and told Defendant to sit down (Tr. 104). After a brief tussle, Brian put Defendant in a "sleeper" hold[5] and Defendant fell asleep in the chaise lounge in the living room (Tr. 84, 104). Brenda called the police (Tr. 84).

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[4] Brenda initially indicated she told "James" P.C. was fourteen, but indicated, "whatever age she was, it was that age, and I told him that he was too old to be calling my house" (Tr. 92).

[5] A "sleeper" hold is a type of lateral vascular neck restraint, which compresses the carotid arteries and jugular veins in the neck but does not put pressure on the airway. *See* Wikipedia Online Encyclopedia at http://en.wikipedia.org/wiki/Chokehold#Blood_choke.

Lawrence Police Officer Erika Schneider responded to the scene within five minutes and found Defendant laying in the chaise lounge in the living room, unconscious, wearing no underwear, and with his pants down to his knees (Tr. 22–24, 107). Officer Schneider performed a sternum rub and Defendant woke up (Tr. 25). Defendant made hand motions which seemed to indicate he needed air from an inhaler or needed to go outside the apartment (Tr. 26–27). Responding personnel attempted to move Defendant into the ambulance when Defendant jumped off the gurney and started running (Tr. 28). Officer Schneider and two of the firemen gave chase, but Defendant outran them, literally running out of his shoes and apparently the condom too as it was found on the ground between the shoes (Tr. 29, 124). The police were able to locate Defendant who had walked home, leaving his car at the scene (Tr. 158–59, 190). At trial, P.C. confirmed that Defendant was the person she knew as "James" (Tr. 61).

SUMMARY OF ARGUMENT

I. The trial court properly allowed the State to amend the charging information. The charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information. The permissibility of an amended information falls into three categories: amendments correcting an immaterial defect that does not prejudice the defendant's substantial rights; amendments regarding matters of form; and amendments addressing matters of substance. In this case, however, Defendant's counsel withdrew, which required the court to set a new omnibus date. However, the court failed to do so. Had the court re-set the omnibus date as it should have when new counsel appeared, the State would have been permitted to amend the charges regardless of whether the amendment was in form or substance. Even so, the amendment in this case involves a matter of form. No additional conduct was alleged and the *exact same defense* was available to Defendant for the

additional crime alleged. Consequently, the amendment did not affect the substantial rights of the Defendant and the court's decision to allow the amendment should be affirmed.

II. The State presented sufficient evidence to sustain Defendant's conviction for attempted sexual misconduct with a minor. This Court will neither reweigh the evidence or assess the credibility of the witnesses and will consider only the evidence supporting the verdict. This Court must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find Defendant guilty beyond a reasonable doubt. Defendant appears to contest only that the State failed to prove Defendant knew the victim was between fourteen and sixteen. The victim's mother spoke to Defendant on the telephone and told him her daughter was thirteen or fourteen. There is ample evidence to support the jury's verdict and it should be upheld. By asserting the "incredible dubiosity" rule, Defendant is merely asking the Court to assess the credibility of the witnesses, which the reviewing court will not do.

ARGUMENT

I. The trial court properly allowed an amendment in form to the charging information.

The court properly allowed the State to amend the charging information. "A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information." *Fajardo v. State*, 859 N.E.2d 1201, 1203 (Ind. 2007); I.C. 35-34-1-5. The permissibility of an amended information falls into three categories: amendments correcting an immaterial defect that does not prejudice the defendant's substantial rights; amendments regarding matters of form; and amendments addressing matters of substance. *Fajardo*, 859 N.E.2d at 1203. Indiana Code Section 35-34-1-5(b) states that an "information may be amended in matters of substance or form" at any time up

to thirty days before the omnibus date for a felony. The code also provides that "[u]pon a motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant." I.C. 35-34-1-5(c). The omnibus date remains set until final disposition unless, among other things: "subsequent counsel enters an appearance after the omnibus date and previous counsel withdrew or was removed due to: (A) a conflict of interest; or (B) a manifest necessity required that counsel withdraw from the case[.]" I.C. 35-36-8-1(d)(2).

The State acknowledges the amendment to add Count III occurred after the original omnibus date. However, irrespective of whether the amendment was one of form or substance, subsequent defense counsel appeared, necessitating a new omnibus date and, therefore, mooting the issue. Attorney Robert Hill represented Defendant as of August 24, 2005 (App. 6, 184). The court set the omnibus date to be October 21, 2005 (App. 184–85). The State moved to add count on October 25, 2005, the first pre-trial conference (App. 9). On November 18, 2005, Attorney Hill filed a motion to withdraw (App. 10, 62–64). The basis of Attorney Hill's withdrawal was related to Defendant's financial situation (App. 62, 64). The court granted the motion to withdraw and on November 29, 2005, appointed Public Defender Laura Pitts to represent Defendant, more than a month after the omnibus date (App. 11, 65). The court, however, did not set a new omnibus date.

After the fact. Not sure it matters.

Had Attorney Pitts developed a new theory of the case, an alibi, or affirmative defense of mental illness, the failure to file before the omnibus date might have precluded presentation of such a defense. *See* I.C. 35-36-2-1 (notice of insanity defense must be filed no later than twenty days before omnibus date, or later in the interest of justice and showing of good cause); I.C. 35-

36-4-1 (notice of alibi must be filed no later than twenty days before omnibus date, but *may* be extended per Section 3). The trial court should have set a new omnibus date to allow Attorney Pitts to consider the case as a whole. Consequently, the court's decision to allow the State to amend the information is immaterial in light of the fact a new omnibus date was required after Attorney Hill withdrew.

Even so, the amendment was one of form, not substance. "[T]he distinction between matters of substance and those of form has long been a crucial factor in determining whether charging informations may be amended[.]" *Fajardo*, 859 N.E.2d at 1203. An amendment is one of form, not substance, if a defense under the original information would be equally available after the amendment, and the defendant's evidence would apply equally to the information in either form. *Id.* Conversely, an amendment is one of substance if it is essential to establishing a valid charge of the crime. *Id.* (citing *McIntyre v. State*, 717 N.E.2d 114, 125-26 (Ind. 1999)). An amendment addressing a matter of substance is permitted only if made more than thirty days before the omnibus date for felonies. *Id.*; I.C. 35-34-1-5.

The State filed the amended information on October 27, 2005, which added Count III in relevant part:

> Michael Hill, being at least twenty-one (21) years of age, on or about August 11, 2005, did attempt to commit the crime of Sexual Misconduct With a Minor, that is: Michael Hill did attempt to intentionally perform or submit to sexual intercourse with [P.C.], a child who Michael Hill believed to be fourteen (14) to sixteen (16) years of age, by engaging in the following conduct which constituted a substantial step toward the commission of said crime Sexual Misconduct With a Minor, that is: knowingly entered her bedroom, while she was present, disrobed and placed a condom on his penis which constituted a substantial step toward the commission of said crime of Sexual Misconduct with a Minor[.]

(App 57). The state made no changes to Count I, attempted child molesting or Count II, resisting law enforcement (App. 32). In *Farjardo*, two days before trial, the trial court permitted the State

to add a second count of child molesting in addition to the original count charged. *Fajardo*, 859 N.E.2d at 1203. In that case, the additional added count changed a possible defense because of timing issues and the age of the victim. *Id.* That is, the amendment increased the defendant's burden to establish the anticipated defense. The Court found that the addition of a second count was a matter of substance, which required the application of the time requirement under Ind. Code Section 35-34-1-5(b). The amendment in the instant case, however, was one of form related to the original count and did not create or eliminate a possible defense or shift the focus of the State's case in any way.

Moreover, it should be noted that after *Fajardo* was decided, the General Assembly amended Section 35-34-1-5 so that a charging information may be amended at any time prior to trial as to either form *or* substance, so long as such amendment does not prejudice the substantial rights of the defendant. *See* P.L. 178-2007 § 1 (emergency eff. May 8, 2007); *Laney v. State*, 868 N.E.2d 561, 565 n.1 (Ind. Ct. App. 2007). While the version of the statute in effect at the time of Defendant's trial must be addressed, as well as *Fajardo's* interpretation of it, the clear intent to of the Legislature is to allow such amendments provided the substantial rights of the defendant are not prejudiced. *Laney*, 868 N.E.2d at 565 n.1. Thus, this Court should consider the clear intent of the Legislature.

Defendant's substantive rights were not impinged by the late amendment. The factual basis of the new charges was not new; rather, the additional attempted sexual misconduct with a minor charge was merely a reiteration of the more serious attempted child molesting charge already filed. Defendant had ample time to investigate and prepare his defense to similar, if not lesser, charges based on the same facts. The amendment occurred on October 25, 2005, and Defendant was tried on July 10, 2006, which afforded him ample time to make further

investigation and preparation before trial. Unlike *Fajardo*, this was simple not the case of entirely new charges being bootstrapped to a pending case but instead a refinement of charges filed based on known facts. Furthermore, the additional charges in *Fajardo* occurred during a different time period from the original charging information. Here, the additional charge is based on the *same conduct* and is a lesser degree felony as opposed to a greater degree of felony in *Fajardo*. This case also begs the question of whether Defendant would have asked for a lesser-included instruction had the State not charged him with Count III. *See* Court's Instruction No. 8, App. at 166. In other words, the additional charge likely helped, instead of hurt, Defendant.

Defendant claims "the new charge added the requirement of knowledge to Mr. Hill in that he believed the child was between fourteen (14) and sixteen (16) years of age." Appellant's Br. at 8. It is a defense to an allegation of sexual misconduct with a minor that the accused reasonably believed the minor was at least sixteen years of age at the time of the conduct. I.C. 35-42-4-9. Likewise, it is a defense to an allegation of child molesting that the accused believed the child was sixteen years of age or older at the time of the conduct. I.C. 35-42-4-3(c). The additional charge, therefore, changed absolutely nothing related to Defendant's reasonable belief that P.C. was sixteen years of age or older. Defendant's substantive rights were not violated by the late amendment to the charging information, assuming *arguendo* the amendment was even late in light of the court's failure to set a new omnibus date. Accordingly, this Court should affirm the trial court's decision to allow the amendment.

II. The State presented sufficient evidence.

In reviewing a sufficiency of the evidence claim, the standard of review is well settled. *Beeler v. State*, 807 N.E.2d 789, 791 (Ind. Ct. App. 2004). A reviewing court does not reweigh

the evidence presented at trial or judge the credibility of the witnesses "and respects 'the jury's exclusive province to weigh conflicting evidence.'" *McHenry v. State*, 820 N.E.2d 124, 125 (Ind. 2005) (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). "Not only must the fact-finder determine whom to believe, but also what portions of conflicting testimony to believe." *In re J.L.T.*, 712 N.E.2d 7, 11 (Ind. Ct. App. 1999). A defendant's conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the fact finder. *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). When addressing the evidence, a jury is responsible for making common sense inferences. *Davis v. State*, 796 N.E.2d 798, 806 (Ind. Ct. App. 2003). "To be sure, '[appellate courts] expect jurors to draw upon their own personal knowledge and experience in assessing the credibility and deciding upon guilt or innocence.'" *Neville v. State*, 802 N.E.2d 516, 519 (Ind. Ct. App. 2004) (quoting *Carter v. State*, 754 N.E.2d 877, 882 (Ind. 2001)).

To sustain a conviction for attempted sexual misconduct with a minor, the State was required to prove that Defendant was twenty-one years old or older, and attempted to perform or submit to sexual intercourse with P.C., a minor who Defendant believed to be between the age of fourteen and sixteen, by taking a substantial step toward commission of misconduct, which was entering P.C.'s bedroom, disrobing, and placing a condom on his penis. I.C. 35-42-4-9. Indiana Code Section 35-41-2-2(b) states that a person engages in conduct "knowingly" if, the person is aware of a high probability that he is doing so. An individual engages in conduct intentionally if, when he engaged in the conduct, it is his conscious objective to do so. *See* I.C. 35-41-2-2(a). Intent is a mental function and, absent a defendant's confession, it must be determined from a consideration of the defendant's conduct and the natural and usual consequences of that conduct. *West v. State,* 805 N.E.2d 909, 915 (Ind. Ct. App. 2004), *trans. denied.* Thus, the trier of fact is

permitted to infer intent from the surrounding circumstances. *E.H. v. State,* 764 N.E.2d 681, 683 (Ind. Ct. App. 2002).

The State proved each element of the crime as charged. Defendant appears to dispute only his belief regarding P.C.'s age. *See* Appellant's Br. at 9–11. The State proved P.C. was thirteen or fourteen at the time of the incident (Tr. 91–92). It is of no moment that Defendant may have initially believed P.C. was sixteen based on her profile on Tango Personal. Brenda told Defendant over the phone P.C. was thirteen or fourteen when Defendant began calling her, which was after P.C. placed her profile on the chat line (Tr. 91–92). The circumstances surrounding the incident would have also put Defendant on notice, specifically: (1) the telephone conversations Brenda had with Defendant; (2) the fact P.C. let Defendant in the apartment complex and opened the door while she was on the phone; (3) P.C. walked Defendant directly to her room, and locked the door; (4) the child-like furniture in P.C.'s room, including the twin bed; (5) the fact that Brian heard Defendant rustling the blinds as if to escape out the window, (6) the fact that Defendant was hiding under the bed; and (7) Defendant's eventual flight from the scene. In light of the evidence, the jury was entitled to believe Defendant knew P.C. was not sixteen and that the condom he placed on his penis was evidence of his intent.

Defendant seeks to invoke the "incredible dubiosity" rule. *See* Appellant's Br. at 10. Application of the "incredible dubiosity" rule, however, is "limited to cases where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion *and* there is a complete lack of circumstantial evidence of the defendant's guilt." *Majors v. State*, 748 N.E.2d 365, 367 (Ind. 2001). "Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Fajardo*, 859 N.E.2d at 1208. This is not an appropriate case in which

the incredible dubiosity rule applies. Brenda's testimony was not incredibly dubious, inherently improbable, equivocal, or the result of coercion, nor is there a complete lack of circumstantial evidence of Defendant's guilt. Thus, the rule does not apply and this Court should find sufficient evidence to sustain Defendant's convictions.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court affirm the trial court in all respects.

Respectfully submitted,

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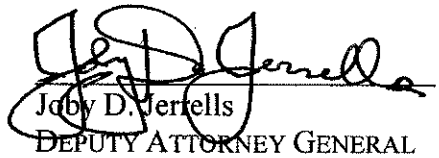

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Certificate of Service

I do solemnly affirm under the penalties for perjury that on August 23, 2007, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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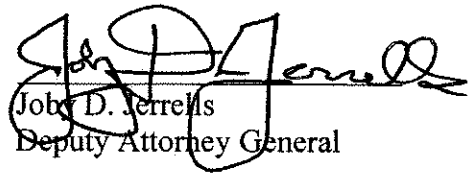

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